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In the Supreme Court of the United States

OCTOBER TERM, 1984

JAMES MASSA, PETITIONER
v.
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals properly concluded that any error in the admission of out-of-court statements by one of petitioner's co-conspirators, who did not testify, was harmless.

2. Whether the trial court committed plain error in instructing the jury that it could infer knowledge from proof that petitioner "deliberately closed his eyes to what would otherwise have been obvious to him" without "balancing" that instruction.

3. Whether the "sale of business" doctrine invalidates petitioner's conviction for securities fraud.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 740 F.2d 629.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 1984. A petition for rehearing was denied on October 2, 1984 (Pet. App. 35a). On November 26, 1984, Justice Blackmun extended the time within which to file a petition for a writ of certiorari until December 28, 1984, and the petition was filed on December 18, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted on all 29 counts against him in an indictment charging, inter alia, a conspiracy to defraud Stix & Company, a

St. Louis brokerage firm.[1] He was sentenced to 20 years' imprisonment, to be followed by five years of probation, and fined $45,000 (Pet. App. 8a-9a). The court of appeals affirmed (*id.* at 1a-34a).

1. The evidence at trial showed a scheme to loot the assets of Stix by extracting cash from ten margin accounts controlled by the conspirators. Thomas Brimberry, an employee of the brokerage firm who maintained its margin accounts, altered company records to create the appearance that the ten accounts contained various securities, when, in fact, the accounts contained few genuine securities. To deceive the firm's auditors and securities regulators, Brimberry placed forged stock certificates in the company's vault (Pet. App. 3a-4a). The conspirators withdrew funds from the firm by borrowing up to the margin limit on the strength of the supposed equity in the securities.[2] Between 1975, when the fraud began, and 1981, when it was discovered, more than $40 million of counterfeit securities were credited

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[1]Petitioner was convicted on one count of conspiracy, in violation of 18 U.S.C. 371; twelve counts of mail fraud, in violation of 18 U.S.C. 1341; six counts of wire fraud, in violation of 18 U.S.C. 1343; five counts of securities fraud, in violation of 15 U.S.C. 78j(b) and 78ff; and five counts of making false entries in securities records, in violation of 15 U.S.C. 78q(a)(1) and 78ff.

Petitioner's co-defendant Duane Skinner was also convicted on all counts with which he was charged (Pet. App. 2a). Co-defendant Arthur Miller pleaded guilty (Pet. App. 9a n.2). The indictment also named Thomas Brimberry, Janice Brimberry, and Jerry Maeras as unindicted co-conspirators.

[2]Margin limits govern the portion of a customer's securities purchase that a brokerage firm may finance. See generally Section 7 of the Securities Exchange Act of 1934, 15 U.S.C. 78g. At the times relevant to this case, brokerage firm customers had to maintain a 50% equity in their accounts (II Tr. 34). As a result, whenever Brimberry falsely recorded the receipt of a security, the account holder could borrow in cash from the firm one half of that security's value.

to the conspirators' margin accounts (X Tr. 10), and Stix was defrauded of approximately $24 million.[3]

As the number of forged securities and the amounts stolen grew, so did the risk of discovery. Therefore, in 1979 and 1980 the conspirators bought stock in the firm from three individuals and from the company itself with the embezzled money — eventually acquiring a 60% interest (Pet. App. 5a). The stock purchases allowed the conspirators to control the firm's board of directors and to promote Brimberry to a position in which he could control the firm's margin accounts yet remain virtually immune from supervision by the company's management (IV Tr. 22-23, 194-195; V Tr. 55-58).

The withdrawal of such enormous sums from the firm threatened to place Stix in violation of the net capital requirements of the Securities Exchange Act.[4] To alleviate this problem, the conspirators used embezzled funds to extend subordinated loans to Stix — loans that Securities and Exchange Commission rules permit a firm to count as part of its net capital (IV Tr. 124). The conspirators extended one loan in petitioner's name and two in the names of fictitious trusts (*id.* at 125), thus preventing Stix from learning that the funds came from the margin accounts (see V Tr. 36-37, 41, 44-45). The conspirators obtained interest from Stix on the loans, and could embezzle the principal again.

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[3]This included $16 million cash withdrawn from the accounts, together with approximately $8 million in unpaid interest owed by the conspirators on the funds borrowed through the margin accounts and unpaid commissions attributable to the conspirators' securities trading.

[4]Section 15 of the Securities Exchange Act, 15 U.S.C. 78*o*, and 17 C.F.R. 240.15c3-1, govern the minimum net capital with which broker-dealers may operate.

2. Petitioner, who was Brimberry's attorney (XI Tr. 159-160), denied any knowledge that he was participating in the scheme (*e.g., id.* at 157-158). The record, however, demonstrates that he knowingly played a central role in defrauding Stix.

Petitioner held two of the fraudulent margin accounts, on which he received monthly statements (XI Tr. 211). These accounts, from which petitioner withdrew $2.5 million, ultimately contained $7.1 million in counterfeit securities.[5] Petitioner admits he did not have the resources to pay for such securities. He claims, rather, that he believed that Brimberry, the margin clerk, was independently wealthy and loaned or gave him the securities out of friendship (*e.g.*, XII Tr. 3-4). Petitioner kept approximately $1 million (X Tr. [redacted]-182), and an additional $1.4 million of the money was used to buy stock in, or make loans to, Stix. Petitioner also acted as a conduit for approximately $5.2 million of the stolen funds (*id.* at 179-180), most of which passed to other conspirators or into business ventures set up by the conspirators.

Petitioner was instrumental in arranging the subordinated loans extended by the conspirators to Stix in furtherance of the scheme. As noted, he served as the lender on one of the loans; he also served as "trustee" for the fictitious trusts in whose names the conspirators made the other loans (Pet. App. 4a-5a). He helped to prepare false loan documents (XI Tr. 190-191), and personally misled Stix management to conceal the true source of the funds for the

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[5]Petitioner states (Pet. 5) that he, unlike others who opened the fraudulent margin accounts, had deposited "legitimate" money in one of his accounts. That money, however, amounted to little more than $60,000 out of a final account purportedly containing $7.1 million in securities (X Tr. 29).

loans.[6] He received the interest checks on the loans, pocketing substantial amounts of the loan interest and disbursing other interest payments to his co-conspirators.[7]

Petitioner incorporated, held stock in, became an officer of, or acted as corporate counsel for most of the businesses through which the conspirators funneled the money stolen from Stix (Pet. App. 6a). He also bought Stix stock with embezzled funds, falsely telling Stix's management that he was using his own money for the purchases. These purchases eventually made petitioner the majority shareholder, and he placed himself and Brimberry on the board of directors. *Id.* at 5a.

Petitioner used his power as majority stockholder to facilitate the fraud. He promoted Brimberry to vice-president in charge of the firm's operations (IV Tr.

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[6]Petitioner told Stix officers that the beneficiary on one of the lending trusts — Alma E. Shaw, who was actually the wife of co-conspirator Jerry Maeras — was a well-to-do person (VI Tr. 39-40), a statement that he knew was false (XI Tr. 190). When Stix officials asked petitioner for copies of the trust documents relating to another subordinated loan under the name of Helen Kamadulski, the maiden name of Brimberry's mother-in-law, petitioner prepared papers designating the fictitious "January Management Corporation" as settlor. Petitioner induced his legal secretary, over her objections, to sign the papers as secretary of the nonexistent company (VII Tr. 63-64).

[7]Petitioner received $101,000 in interest from the Kamadulski trust loan. He deposited the checks to his personal account rather than a trust account, and spent the money (XI Tr. 197). Petitioner claims that he was crediting the money to unpaid legal fees owed by Brimberry (Pet. 6).

Petitioner also received the income from the Alma E. Shaw loan and turned the checks over to co-conspirator Jerry Maeras, who in turn split the money with Brimberry (VII Tr. 60-62; VI Tr. 59). When Maeras filed accurate tax forms with respect to income from the loan, petitioner and Brimberry both became angry (VI Tr. 65-67). Petitioner obviously understood that the income from the loan was intended to be concealed.

22-23).[8] When the firm's chief financial officer complained that this promotion, combined with Brimberry's responsibility at the same time as a stockbroker for the ten margin accounts, would weaken the firm's internal accounting controls, petitioner dismissed the complaint (*id.* at 193-194). Petitioner threatened to fire any Stix employee who circumvented Brimberry's authority by taking operational problems to the president or the board of directors (IV Tr. 28-30).[9]

Petitioner also helped Brimberry, who "began to exhibit a more lavish lifestyle" in 1978 (Pet. App. 6a), protect himself from discovery by the Internal Revenue Service. A $250,000 loan from petitioner to Brimberry was arranged using stolen funds, so that Brimberry could explain how he could afford the expensive home he was building (*ibid.*).

3. The case against petitioner rested on documentary evidence of the fraud and on the testimony of Stix employees, petitioner's secretary, and other conspirators.[10] The organizer of the fraud, Thomas Brimberry, did not

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[8]This operational control allowed Brimberry to convert customer securities to cash by pledging them, and to prevent the firm from attempting to lend or pledge the bogus securities (V Tr. 64-67). Further, when a firm employee brought to the attention of Brimberry and petitioner complaints that the firm's auditors were concerned about inadequate segregation of customers' fully-paid securities, petitioner suggested firing the auditors (V Tr. 171).

[9]On one of the first occasions that petitioner intervened in Stix management, he sponsored a motion at a shareholders meeting to remove both the firm's corporate counsel and the firm's chief financial officer from the board of directors (IV Tr. 17-19). When the motion passed, several shareholders tendered back their stock, which petitioner bought (*id.* at 180-182). Although petitioner eventually allowed the chief financial officer to rejoin the board, petitioner had by then freed Brimberry from any supervision (see *id.* at 29; V Tr. 56-58).

[10]Three co-conspirators, Janice Brimberry, Arthur Miller, and Jerry Maeras, testified.

testify. Although he had entered into a plea bargain with the government, he had not given correct information to the grand jury, and the prosecution did not call him to testify at trial (XIII Tr. 31-32 stipulation).[11] In several instances, the co-conspirators who testified recounted details of the scheme that Brimberry had confided to them (see Pet. 16-18). Before admitting these out-of-court statements by Brimberry the trial court determined preliminarily (II Tr. 73-80) that they qualified for admission as co-conspirator statements under Fed. R. Evid. 801(d)(2)(E).[12] The court rejected petitioner's argument that admission of the statements would violate his Sixth Amendment right to confront Brimberry (XI Tr. 27-29).

Petitioner testified and denied having any knowledge of the looting scheme, contending that Brimberry had fooled him just as he fooled others. Before instructing the jury, the court overruled petitioner's objection to a "willful blindness" charge (XII Tr. 161). Under that instruction, the jury could infer knowledge of the fraud if it found that petitioner "deliberately closed his eyes" to the facts.[13]

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[11]Brimberry faced perjury and obstruction of justice charges at the time of petitioner's trial. See *United States* v. *Brimberry*, 744 F.2d 580 (7th Cir. 1984).

[12]Rule 801(d)(2)(E) provides:

> (d) *Statements which are not hearsay.* A statement is not hearsay if —
>
> (2) Admission by party-opponent. The statement is offered against a party and is * * * (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

[13]Charge 65 provided:

> The element of knowledge may be satisfied by inferences drawn from proof that a defendant deliberately closed his eyes to what would otherwise have been obvious to him. A finding beyond a reasonable doubt of a conscious purpose to avoid enlightenment

Following the 14-day trial, the jury returned a verdict of guilty on all counts.

4. The court of appeals affirmed. It considered and rejected petitioner's argument that the admission of Brimberry's out-of-court statements was reversible error (Pet. App. 18a-20a). It also held that the district court had not erred in giving the "willful blindness" instructions (*id.* at 23a-25a).

With regard to Brimberry's out-of-court statements, the court first determined that they were admissible under Rule 801(d)(2)(E). Petitioner had argued that they were not admissible against him because there was insufficient independent evidence that he was part of the conspiracy. The court of appeals disagreed: "Documentary evidence and stipulations showed that $7 million worth of securities in Massa's accounts were fraudulent, that Massa obtained $2.5 million of Stix's money for his own use, and that Massa used money withdrawn from the Stix margin accounts to buy a controlling interest in Stix" (Pet. App. 14a). This evidence, "together with testimony linking Massa to the fraudulent subordinated loans" (*ibid.*), was sufficient independent evidence of petitioner's role in the fraud.

The court went on to consider whether the admission of Brimberry's statements nevertheless violated the Confrontation Clause. The court expressly determined not to decide this issue. Instead, it held that "any error was harmless beyond a reasonable doubt" (Pet. App. 18a-19a).

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would permit an inference of knowledge. Stated another way, a defendant's knowledge of a fact may be inferred from willful blindness to the existence of a fact.

It is entirely up to you as to whether you find any deliberate closing of the eyes, and the inferences to be drawn from any such evidence. A showing of negligence or mistake is not sufficient to support a finding of willfulness or knowledge.

On the "willful blindness" charge, petitioner had argued to the court of appeals that such a charge permitted a jury to convict without finding subjective knowledge of wrongdoing by petitioner. The court of appeals rejected that argument, noting, first, that a number of circuits had approved the use of the instruction, which permits a jury to infer the element of knowledge from deliberate indifference (Pet. App. 24a). Second, viewing the instructions as a whole, the court concluded that the jury could not have been misled by the instruction as petitioner had argued (*id.* at 24a-25a and n.8).

ARGUMENT

1. Petitioner contends that the court of appeals applied an improper legal standard when it ruled that any error in admitting Brimberry's out-of-court statements was harmless beyond a reasonable doubt (Pet. App. 18a-19a).[14]

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[14]There is a conflict among the circuits on whether, when the traditional requirements for admission of co-conspirator declarations are satisfied, the Confrontation Clause nevertheless imposes additional conditions that must be satisfied before the evidence may be admitted. Specifically, the cases conflict on whether statements made in the course of and in furtherance of a conspiracy to which the defendant has been connected by the requisite quantum of independent evidence must in addition be shown to satisfy some independent test of reliability and whether as a precondition to admission of such evidence the prosecution must establish the unavailability of the declarant. Compare *United States* v. *Inadi*, 748 F.2d 812 (3d Cir. 1984); *United States* v. *Ordonez*, 737 F.2d 793 (9th Cir. 1983); *United States* v. *Ammar*, 714 F.2d 238, 254-257 (3d Cir. 1983), cert. denied, 464 U.S. 936 (1983); *United States* v. *Wright*, 588 F.2d 31, 37-38 (2d Cir. 1978), cert. denied, 440 U.S. 917 (1979); *United States* v. *Kelley*, 526 F.2d 615, 620-621 (8th Cir. 1975), cert. denied, 424 U.S. 971 (1976); and *United States* v. *Snow*, 521 F.2d 730, 734 (9th Cir. 1975), cert. denied, 423 U.S. 1090 (1976) with *United States* v. *Lurz*, 666 F.2d 69, 80-81 (4th Cir. 1981), certs. denied, 455 U.S. 1005 and 457 U.S. 1136 (1982); *United States* v. *Kendall*, 665 F.2d 126, 133 (7th Cir. 1981), cert. denied, 455 U.S. 1021 (1982); *United States* v. *Peacock*, 654 F.2d 339 (5th Cir. 1981), cert. denied, 464 U.S. 965 (1983); *United States* v. *Burroughs*, 650 F.2d 595, 597 n.3 (5th

Petitioner argues that the court "made no effort to evaluate the impact of the erroneously admitted evidence on the jury," as required by decisions of this Court, but rather "satisfied itself" that there was other evidence linking petitioner to the conspiracy (Pet. 14). This contention is meritless. The court of appeals applied settled law in finding harmless error; petitioner merely contests its factual analysis, review of which is not warranted.

A reviewing court should find an error harmless whenever review of the whole record makes it clear beyond a reasonable doubt that an average jury would have returned a verdict of guilty regardless of the error. See *United States* v. *Hasting*, 461 U.S. 499, 510-511 (1983); see also *Harrington* v. *California*, 395 U.S. 250, 254 (1969); *Schneble* v. *Florida*, 405 U.S. 427, 432 (1972); *Chapman* v. *California*, 386 U.S. 18, 24 (1967); *Kotteakos* v. *United States*, 328 U.S. 750, 763-764 (1946). While the court of appeals did not expressly state that it had assessed the record from the perspective of a jury (see Pet. App. 14a-15a), that omission is a matter of form, not substance. The court of appeals was

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Cir.), cert. denied, 454 U.S. 1037 (1981); *United States* v. *Papia*, 560 F.2d 827, 836 n.3 (7th Cir. 1977); and *Ottomano* v. *United States*, 468 F.2d 269, 273 (1st Cir. 1972), cert. denied, 409 U.S. 1128 (1973). The court below appears to have aligned itself with those circuits that do subject co-conspirator declarations to some form of independent scrutiny under the Confrontation Clause (see Pet. App. 15a-17a).

We believe the conflicting views of the circuits on these important questions deserve review by this Court in an appropriate case. Indeed, the Solicitor General has authorized the filing of a petition for a writ of certiorari in *United States* v. *Inadi, supra*, in which the court of appeals reversed a conviction on the ground that the prosecution had failed satisfactorily to establish the unavailability of the co-conspirator whose statements were admitted at trial. Because the decision in this case does not rest upon a holding adverse to petitioner on these questions, but rather upon the conclusion that any error in admission of Brimberry's statements was harmless, this is not a suitable vehicle for resolution of the conflict.

fully cognizant of the correct standard; it explicitly relied on the *Hasting, Harrington,* and *Schneble* decisions in holding the admission of the statements "harmless beyond a reasonable doubt" (Pet. App. 19a).

Following the dictate of those cases, the court of appeals reviewed the trial record, and determined that the admission of the statements, when viewed in the context of the whole record, had not prejudiced petitioner's case (Pet. App. 19a-20a). The court found that, with one exception, the statements concerned matters that were not disputed and were established by other evidence, and thus "were not harmful" to petitioner's defense (*ibid.*).[15] It held that the one exception — in which co-conspirator Miller testified that Brimberry warned him that exposure of the scheme would get petitioner in trouble — "[w]hen viewed in the context of all of the evidence tying Massa to the Stix fraud and to the other conspirators, * * * is hardly damaging enough to require reversal" (Pet. App. 18a-19a).

In evaluating how Brimberry's statements might have affected an average jury, all that the court of appeals could do was determine how strong was the remainder of the evidence presented to the jury, and how significant was the allegedly inadmissible evidence in light of the whole record.[16] In fact, petitioner agrees that "[i]n evaluating the impact improperly admitted evidence has on the mind of the jury,

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[15]The court also noted that some of the statements were not even admitted to prove their truth, but for other reasons (Pet. App. 20a).

[16]Petitioner's only claim of prejudice is that the statements swayed the jury because they were "damning evidence" of his participation in the conspiracy (Pet. 16). Petitioner does not claim that the statements were inflammatory or otherwise unfairly prejudiced the jury. Thus, in evaluating the effect of the statements on an average jury, the court of appeals could consider only how strong the statements were as evidence and how strong the remaining evidence was.

this Court always has compared the quality of the remaining evidence in the record with the effects of the constitutional violation" (Pet. 15).[17] That is exactly what the court of appeals did. Petitioner essentially contends that the court incorrectly assessed the strength of the prosecution's case,[18] and asks this Court to reexamine a record that the lower court has already combed. Review of such a question is not warranted.[19]

2. In its "willful blindness" instruction, the district court instructed the jury that it could infer that petitioner knew of the fraudulent nature of the scheme if it found that he "deliberately closed his eyes to what would otherwise have been obvious to him" and showed "a conscious purpose to

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[17]See, *e.g.*, *United States* v. *Hasting*, 461 U.S. at 511-512; *Harrington* v. *California*, 395 U.S. at 254.

[18]Petitioner appears to argue that because the case against him was based on circumstantial evidence, the improper admission of any evidence is *per se* reversible error (Pet. 15-16). Such a rule would be totally without basis. The mere labeling of evidence as "circumstantial" or "direct" says little about its strength. Many cases built solely on circumstantial evidence are as strong as direct cases, and there is no basis for treating them differently for purposes of assessing harmless error. See *Holland* v. *United States*, 348 U.S. 121, 139-140 (1954). See also *Herman & McLean* v. *Huddleston*, 459 U.S. 375, 390 n.30 (1983) (circumstantial evidence is "more than sufficient" to prove scienter in fraud cases). Petitioner also suggests (Pet. 16) that the circumstantial evidence in this case was weak, stating that the government "conceded" in the court of appeals that the case against petitioner "was strictly 'circumstantial'." In fact, what the government said was "that the evidence connecting Massa to this conspiracy, although circumstantial, is overwhelming" (Appellee's Br. 18).

[19]This Court has often observed that questions of evidentiary sufficiency are chiefly the responsibility of the courts of appeals. *E.g.*, *Hamling* v. *United States*, 418 U.S. 87, 124 (1974). In this case, petitioner presses for a review of the evidence that is analogous to review of evidentiary sufficiency. That task is equally a matter for the courts of appeals. See *United States* v. *Hasting*, 461 U.S. 499, 516-517 (1983) (Stevens, J., concurring).

avoid enlightenment" (see note 13, *supra*). Petitioner asserts (Pet. 21) that a court cannot so instruct a jury unless it "balances" the instruction by: (1) stating that the defendant must have been aware of the "high probability" of the fraud; and (2) emphasizing that the jury cannot convict if the defendant acted in good faith without knowledge of the fraud. Petitioner contends that the circuits have split on whether a trial court must use this additional language (Pet. 19-23). In fact, no conflict exists over a court's obligation to use such language where, as here, it was not requested at trial. In addition, petitioner was not prejudiced by the omission of the specific language he now requests. Thus, further review is not warranted.

Petitioner did not ask the district court to instruct the jury in the terms he now urges.[20] Accordingly, petitioner must establish "plain error" within the meaning of Fed. R. Crim. P. 52(b). See Fed. R. Crim. P. 30. No court has held that failure to instruct in the terms that petitioner now embraces would constitute plain error. To the contrary, those courts of appeals that have considered the question have explicitly stated that the failure to include such language in a "willful blindness" instruction does not constitute plain error. *United States* v. *Glick*, 710 F.2d 639, 642-644 (10th Cir. 1983), cert. denied, No. 83-454 (Jan. 23, 1984); *United States* v. *Cincotta*, 689 F.2d 238, 243-244 (1st Cir.), cert. denied, 459 U.S. 991 (1982); *United States* v. *Dozier*, 522 F.2d 224, 228 (2d Cir.) (on petition for rehearing), cert. denied, 423 U.S. 1021 (1975); see *United States*

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[20]At trial, petitioner objected generally to the charge; he did not propose "balancing" language or object to its absence (XII Tr. 161). Indeed, petitioner's brief in the court of appeals mentioned the "willful blindness" instruction only in a footnote. Appellant's Br. 54 n.2. Petitioner's first mention of "balancing" language came, not in the district court, but in his reply brief in the court of appeals. Appellant's Reply Br. 8 & n.2.

v. *Suttiswad,* 696 F.2d 645, 651-652 (9th Cir. 1982). Thus the courts of appeals are not in conflict on this issue.[21]

Moreover, the absence of the proposed language did not prejudice petitioner because the charge given by the district court was not unbalanced. Evaluating a challenge to the wording of a particular jury instruction necessarily requires review of the charge as a whole. *Cupp* v. *Naughten,* 414 U.S. 141, 146-147 (1973). Here, the district court instructed the jury that the evidence must demonstrate "that the defendant knowingly did an act which the law forbids, purposely intending to violate the law," before the jury could find petitioner guilty (Pet. App. 25a n.8). The willful blindness charge itself explicitly informed the jury that "[a] showing of negligence or mistake is not sufficient to support

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[21]The Second Circuit did not hold otherwise in *United States* v. *Bright,* 517 F.2d 584 (1975), the case petitioner primarily relies upon in claiming that a conflict exists (Pet. 20). In that case the jury, while deliberating, requested clarification concerning the meaning of "reckless disregard" in an instruction stating that the defendant could be found guilty if she acted with reckless disregard as to whether the checks she cashed had been stolen. Defense counsel specifically requested that the court not merely repeat the portion of its prior charge containing the phrase "reckless disregard," but include balancing language as well. The court, however, instead simply repeated what defense counsel termed the "most damning part" of its charge without adding any balancing language (517 F.2d at 588). In light of the lack of balance on the reinstruction, and "counsel's acute objections on the very point" (*ibid.*), the court found error. Thus, far from finding plain error in a "willful blindness" charge, the court in *Bright* held that the district court erred by refusing to balance its clarifying instruction when asked to do so.

The Second Circuit, shortly after *Bright,* made clear that the omission of balancing language is not plain error (*United States* v. *Dozier, supra*). The other Second Circuit cases cited by petitioner (Pet. 21-22) do not show any conflict. In *United States* v. *Aulet,* 618 F.2d 182, 190-191 (2d Cir. 1980), the court affirmed a conviction, finding that the challenged charge contained all the required elements. In *United States* v. *Shareef,* 714 F.2d 232, 234 (2d Cir. 1983), the court found that the absence of balancing language was harmless.

a finding of willfulness or knowledge" (see note 13, *supra*). On three other occasions, as the court of appeals noted, the district court emphasized that the jury could not convict on the basis of "mistake or accident or other innocent reason" (Pet. App. 25a n.8). Thus, the charge expressly required the jury to find actual knowledge. Viewed in the context of the entire charge, the "willful blindness" instruction presented no genuine danger that the jury would convict petitioner on the basis of either negligence or recklessness.[22]

3. For the first time before this Court, petitioner argues that his conviction for securities fraud cannot stand because the scheme did not involve the purchase or sale of a "security" (Pet. 23-27). Petitioner urges the Court to disregard his five separate purchases of Stix stock, insisting that the fraudulent purchases did not, in "economic reality," involve securities because the transactions cumulatively gave him control over Stix. Under the "sale-of-business" doctrine, petitioner maintains, the indictment did not state an offense under the securities laws (Pet. 24-26).

Petitioner's admitted failure previously to raise this issue (Pet. 26) alone renders it inappropriate for review. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). Petitioner attempts to excuse this failure by relying on the provisions

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[22]Every court of appeals that has considered instructions on "willful blindness," "conscious avoidance," or "deliberate ignorance" has rejected the notion that such instructions invite juries to convict on a showing of mere negligence. *United States* v. *DeVeau*, 734 F.2d 1023, 1028 (5th Cir. 1984), cert. denied, No. 84-549 (Jan. 14, 1985); *United States* v. *Gullett*, 713 F.2d 1203, 1212 (6th Cir. 1983), cert. denied, No. 83-432 (Jan. 16, 1984); *United States* v. *Petullo*, 709 F.2d 1178, 1181 (7th Cir. 1983); *United States* v. *Kershman*, 555 F.2d 198, 200-201 (8th Cir.), cert. denied, 434 U.S. 892 (1977); *United States* v. *Joyce*, 542 F.2d 158, 161 (2d Cir. 1976), cert. denied, 429 U.S. 1100 (1977); *United States* v. *Jewell*, 532 F.2d 697, 704 & n.21 (9th Cir.) (en banc), cert. denied, 426 U.S. 951 (1976); *Griego* v. *United States*, 298 F.2d 845, 849 (10th Cir. 1962).

of Fed. R. Crim. 12(b)(2), which states that the failure of an indictment to charge an offense cannot be waived.[23] To be insufficient, however, an indictment not timely challenged must be "so defective that it does not, by any reasonable construction, state an offense." *United States* v. *Knippenberg,* 502 F.2d 1056, 1061 (7th Cir. 1974). See also *Hagner* v. *United States,* 285 U.S. 427, 433 (1932).[24] The present indictment identified the provision of the United States Code violated, the securities that were the subject of the fraud, and the particular misrepresentations made in connection with the purchases, and it alleged the use of the jurisdictional instrumentalities (Indictment, Counts 30-34 ¶¶ 1-3 (incorporating by reference Count 1, ¶¶ 8.F.1 - 8.F.3, 8.F.8 - 8.F.10 and 8.F.28 - 8.F.33)). No more was required. The indictment certainly need not have negated every construction of the facts under which the instruments in question were not securities.

In any event, the sale of business doctrine does not apply in the circumstances presented here. Those courts that have adopted the sale of business doctrine have held that a transaction in which the parties buy and sell control of a business and merely use stock as "the vehicle of transfer" does

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[23]Petitioner's additional contention — that the failure of the court below to consider the sale of business doctrine was plain error under Fed. R. Crim. P. 52(b) — is essentially redundant to his argument under Fed. R. Crim. P. 12(b)(2). In either event, he must argue that the indictment did not state an offense (see Pet. 26).

[24]While a defendant may raise the failure of an indictment to charge an offense at any time, tardily invoking the issue permits the reviewing court to construe the indictment liberally in the prosecution's favor. *E.g., United States* v. *Richardson,* 687 F.2d 952, 965 (7th Cir. 1982); *United States* v. *Previte,* 648 F.2d 73, 80 (1st Cir. 1981). The indictment must so fail to alert a defendant to the nature of the acts charged that (1) he cannot prepare a defense; and (2) a reviewing court could not determine what other offenses would, in the event of trial, be barred by double jeopardy. *Hamling* v. *United States,* 418 U.S. 87, 117 (1974).

not involve a sale of securities. *King* v. *Winkler*, 673 F.2d 342, 346 (11th Cir. 1982); see *Fredericksen* v. *Poloway*, 637 F.2d 1147, 1151-1152 (7th Cir.), cert. denied, 451 U.S. 1017 (1981).[25] The doctrine, however, does not apply when a buyer fraudulently acquires control from a number of sellers, each of whom is not selling "control." *McGrath* v. *Zenith Radio Corp.*, 651 F.2d 458, 467-468 n.5 (7th Cir.), cert. denied, 454 U.S. 1017 (1981). Each sale in the present case transferred stock, not control. Petitioner obtained a controlling interest in Stix only following a series of five purchases during two years from three different persons and from the Stix treasury. No single purchase independently conferred a controlling block,[26] and at least two of the

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[25]The doctrine posits that the common stock of an ordinary business corporation does not constitute a security unless the transaction essentially consists of: (1) an investment in a common venture; (2) premised on a reasonable expectation of profits; (3) to be derived from the managerial or entrepreneurial efforts of others. *Canfield* v. *Rapp & Son*, 654 F.2d 459, 463 (7th Cir. 1981) (citing *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, 852 (1975)). Courts that have embraced the doctrine have concluded that an investor who purchases control of the corporation does not intend to derive his profits from the efforts of others. *E.g.*, *Fredericksen* v. *Poloway*, 637 F.2d 1147, 1151-1153 (7th Cir.), cert. denied, 451 U.S. 1017 (1981). In November 1984, this Court granted certiorari in two cases involving the sale of business doctrine, *Landreth Timber Company* v. *Landreth*, 731 F.2d 1348 (9th Cir.) (adopting the doctrine), cert. granted, No. 83-1961 (Nov. 13, 1984), and *Ruefenacht* v. *O'Halloran*, 737 F.2d 320 (3d Cir.) (rejecting the doctrine), cert. granted, No. 84-165 (Nov. 13, 1984). The Securities and Exchange Commission has filed briefs amicus curiae in those cases urging the Court to reject the sale of business doctrine. Even if that doctrine were valid, however, it clearly would not reach the instant transactions for the reasons given in text and in note 27. Accordingly, there is no reason to hold this case pending those decisions.

[26]Petitioner ultimately obtained a 60% interest consisting of more than 25,000 shares. His first purchase of 2500 shares therefore presumably comprised less than 10% of the stock. His second and third purchases, each of 10,000 shares, comprised less than 30% each (IV Tr. 12-13, 15-16, 105-107, 175-177, 181-182). The remaining two purchases combined equalled only 820 shares (IV Tr. 105, 182).

sellers sold their stock not to confer control, but specifically because they disagreed with corporate policies initiated by petitioner (IV Tr. 105-107, 181-182). Were the sale-of-business doctrine applicable to such seriatim purchases, a purchaser of securities could insulate himself from the securities laws simply by assuring that his fraudulent purchases — whether on the open market, by tender offer, or otherwise — combined to vest him with corporate control. No court has so held.[27]

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[27]In addition, courts adopting the sale of business doctrine have held that, where a buyer obtains a substantial interest in a company but the parties intend that the buyer will allow others to manage the enterprise, the federal securities laws govern. See, generally, *Sutter* v. *Groen*, 687 F.2d 197, 201-204 (7th Cir. 1982) (proposing standards to distinguish "entrepreneurial" transactions from investments). The parties here did not contemplate that petitioner would manage Stix. Indeed, petitioner had specifically represented to officers of Stix at the time of his earliest purchase that he wished only to *invest* in Stix (IV Tr. 8-10, 176) and that "his function on the board [of directors] would be as a passive director, who would listen and not necessarily initiate any activity as far as the firm was concerned" (IV Tr. 13).

CONCLUSION

The petition for a writ of certiorari should denied.

Respectfully submitted.

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